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Nos. 82-818 and 82-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BILDISCO and BILDISCO, DEBTOR-IN-POSSESSION, *et al.*, *Respondents*.

and

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD and BILDISCO and BILDISCO, DEBTOR-IN-POSSESSION, *Respondents*.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JAMES C. KUHN, III*
JOHN M. TISHOK
KUHN, ENGLE & STEIN
1512 Frick Building
Pittsburgh, PA 15219
(412) 281-4555
*Counsel of Record**

MICHAEL H. HOLLAND,
General Counsel
MARILYN TOWNSEND
900 15th Street, NW
Washington, D.C. 20005
(202) 842-7340
Counsel for Amicus Curiae, The United Mine Workers of America, International Union

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MOTION FOR LEAVE TO FILE BRIEF OF UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The United Mine Workers of America, International Union ("UMWA" or "Union") hereby moves this Court for leave to file a brief amicus curiae in support of petitioners. Counsel for petitioners have consented to the filing of this brief. Counsel for respondent Bildisco has not consented, indicating his belief that if he gave the UMWA his

consent to file a brief, he would have to do so for other organizations who have made similar requests. Respondents' counsel stated that he had no other reason for opposing the UMWA's request.

The interest of the amicus curiae, the UMWA, is set forth in detail in its brief. To summarize, the UMWA is an industrial union which represents approximately 240,000 coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration. The UMWA is currently signatory to approximately 2,300 collective bargaining agreements with employers involved in every aspect of the coal industry. In the United States these contracts are in effect in twenty-five states.

The failure of the Third Circuit in the case of *In re Bildisco* to follow the Second Circuit's established test that rejection of a collective bargaining agreement should only be permitted upon a showing that the business is likely to fail unless the agreement is rejected has a detrimental effect on the right of the UMWA's members to enjoy the benefits of their collective bargaining agreements. It also has a detrimental effect on the members' right to the statutory procedures for modification and rejection of collective bargaining agreements as guaranteed to them under the National Labor Relations Act.

The UMWA also seeks to participate as an amicus in order that the Court may have the benefit of its views that collective bargaining agreements are not executory contracts subject to rejection under 11 U.S.C. 365(a) of the Bankruptcy Act. The UMWA submits that a collective bargaining agreement, in many of its particulars, sets forth unilateral obligations and does not contemplate mutuality of performance as is required by an executory contract.

For the foregoing reasons the UMWA requests that its Motion to File an Amicus Brief be granted.

Respectfully submitted,

MICHAEL H. HOLLAND, General Counsel
MARILYN TOWNSEND
United Mine Workers of America
900 15th Street, NW
Washington, DC 20005

JAMES C. KUHN, III, *Counsel of Record*
JOHN M. TISHOK
Kuhn, Engle & Stein
1512 Frick Building
Pittsburgh, PA 15219

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BRIEF OF UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The United Mine Workers of America ("UMWA") is an industrial union which represents approximately 240,000 coal miners throughout the United States and Canada for the purposes of collective bargaining and contract administration. The UMWA is currently signatory to approxi-

mately 2,300 collective bargaining agreements with employers in every aspect of the coal industry. In the United States these contracts are in effect in twenty-five states.

The failure of the Third Circuit in the case of *In re Bildisco* to follow the Second Circuit's established test that rejection of a collective bargaining agreement should only be permitted upon a showing that the business is likely to fail unless the agreement is rejected, has a detrimental effect on the right of the UMWA's members to enjoy the benefits of their collective bargaining agreements. It also has a detrimental effect on the members' right to the statutory procedures for modification and rejection of collective bargaining agreements as guaranteed to them under the National Labor Relations Act ("NLRA").

The increase in bankruptcy filings in the coal industry makes it apparent that this decision may have a substantial impact on coal miners.[1] Of late, the UMWA has become an interested party in several reorganization proceedings under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 et seq., where the debtor has attempted to reject its collective bargaining agreement. The Union is fearful that if the *Bildisco* decision is adopted by this Court, coal operators' bankruptcy filings may increase

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[1] In this regard, "Coal Week," a coal industry publication, in a recent article devoted to coal company bankruptcies, quotes sources as stating that in Indiana, "[c]oal company bankruptcies have nearly tripled in the last two years" and in "Virginia coal-related bankruptcies increased sharply from one in 1979 to 25 in 1980 and 28 in 1981." "Coal Week," February 28, 1983 at 3. The article also stated that presently many coal companies rather than filing for bankruptcy "hang on the verge because their banks believe keeping the companies in business is a lesser evil."

even more as it becomes easier for coal operators to reject their collective bargaining agreements with the UMWA.[2]

As is widely known by those familiar with collective bargaining in the coal industry, it has never been easy for the UMWA to obtain collective bargaining agreements with coal operators. Agreements are negotiated only after many failures, and a great deal of time, concessions, expense, and economic and physical sacrifice by the membership.

Once, however, a contract is obtained, the Union believes the membership is entitled to have that contract honored unless the Union through collective bargaining agrees to modify the contract or the employer can show that otherwise he will go out of business. To permit a bankruptcy court to do what it appeared to do in *Bildisco* and reject a hard-won collective bargaining contract because a company can demonstrate what is already apparent, that it is cheaper to operate non-union than Union, will severely damage the confidence of the coal miners in the collective bargaining process and in their right to the protection of the national labor laws.

The UMWA also seeks to participate as an amicus in order that the Court may have the benefit of its views that collective bargaining agreements are not executory contracts subject to rejection under 11 U.S.C. 365(a) of the Bankruptcy Act. The UMWA submits that a collective bargaining agreement, in many of its particulars, sets forth unilateral obligations and does not contemplate

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[2] In fact a recent article on the *Bildisco* decision in a widely read employers' newspaper contributes to these fears. The article, prominently displayed on the front page of the second section, began with the headline "FIRMS USING BANKRUPTCY TO FIGHT LABOR." *Wall St. Journal*, March 30, 1983, at 29, col. 3.

mutuality of performance as is required by an executory contract. The Union recognizes that this view is not widely shared.

SUMMARY OF ARGUMENT

A collective bargaining agreement is not an executory or ordinary contract and may not be rejected without a showing that the employer has bargained with the union and will be forced to cease operations altogether if rejection is not permitted.

A collective bargaining agreement binds an employer in a reorganization proceeding to its terms and conditions and any changes in its terms must be sought within Section 8(d) of the National Labor Relations Act. Should, however, this Court permit rejection of a collective bargaining agreement by a bankruptcy court, such a rejection should only be allowed to occur where it is necessary to ensure survival of the business. If a debtor company can continue to operate without requiring workers to sacrifice accrued benefits and due process in the work place, then the employer should be required to do so.

ARGUMENT

I. A COLLECTIVE BARGAINING AGREEMENT IS NOT AN EXECUTORY CONTRACT SUBJECT TO REJECTION BY A BANKRUPTCY COURT.

The UMWA submits that the court in *Bildisco* did not recognize the significant differences between collective bargaining agreements and mere executory contracts. As a result, it created a standard for rejection of collective bargaining agreements which threatens industrial peace

and will shake the confidence of employees in the process of collective bargaining.[3]

First, as is well recognized, a collective bargaining agreement is not an ordinary contract. See, e.g., *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1963). Moreover, as this Court stated in *Warrior & Gulf Navigation*, 363 U.S. 574, 578-579 (1960), a collective bargaining agreement "is more than a contract, it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . A collective bargaining agreement is an effort to erect a system of industrial self-government."

Given this, it is respectfully urged that a collective bargaining agreement is not a mere executory contract. While Petitioners appear to concede this question, and lower courts in the country have concluded that collective bargaining agreements constitute executory contracts within the meaning of the Bankruptcy Code, the question is not as simple as it may first appear. The Bankruptcy Code does not define executory contracts. The most widely accepted definition is presented by Countryman in his exhaustive articles, "Executory Contracts in Bankruptcy," 57 Minn. L. Rev. 439 (Part I) (1973) and 58 Minn. L. Rev. 479 (Part II) (1974). He states that an executory contract is "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." 57 Minn. L. Rev. at p. 460.

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[3] Section 365(a) of the Bankruptcy Act allows the trustee, in a bankruptcy proceeding, subject to the bankruptcy court's approval, to "assume or reject any executory contract or unexpired lease of the debtor."

This concept of mutuality in executory contracts does not include those unilateral duties which make up so much of a collective bargaining agreement. For example, the National Bituminous Coal Wage Agreement of 1981, the labor contract currently in effect between the UMWA and the multi-employer bargaining group, the Bituminous Coal Operators' Association, Inc., requires the employer to provide health benefits to pensioners as long as the employer is in business and to pay health benefits to laid-off employees according to an established timetable. In these cases, the pensioners and laid-off employees have fully performed their obligations and they rely on future performance by the employer. This is the situation Countryman addressed with the following analysis:

> When the employee has not been fully compensated for all the services he has rendered, he retains a claim against the employer for those services. The contract upon which the employee's claim is based is unilateral because only the employer has made a promise, and such a contract is not executory as that term has been defined under the Act because no further performance is owing from the employee. 58 Minn. L. Rev. at 480 (Citations omitted)

This reasoning was adopted by the court in *In re Louisville Motor Exchange, Inc.*, 26 Bankr. 490 (Bankr. W.D. K.y. 1983) and *In re J. M. Fields, Inc.*, 22 Bankr. 861 (Bankr. S.D. N.Y., 1982). See also *Northwest Airlines, Inc.* v. *Klinger (In re Knutson)*, 563 F.2d 916 (8th Cir. 1977); *Jenson* v. *Continental Financial Corporation*, 591 F.2d 477 (8th Cir. 1979) and *In re Smith Jones, Inc.*, 26 Bankr. 289 (Bankr. D. Minn. 1982).

Similarly, seniority rights involve situations in which the employees have fully performed and in turn rely on the employer's unilateral performance. In addition, grievance and arbitration of disputes, disciplinary proce-

dures and no strike/no lock out agreements are not executory.

The courts and commentators, and the Third Circuit, in particular, have made much of the exemption granted collective bargaining agreements subject to the Railway Labor Act ("RLA"), see 11 U.S.C. § 1167, in support of their contention that all labor agreements except those under the RLA are executory. Argument by negative implication is inherently risky, and the Union submits that the Court below erred in its conclusion that the RLA exemption proves that all other collective bargaining agreements are not to be excluded.[4] In fact, the RLA exemption merely shows congressional awareness of the particular importance of the railroads to the economic strength and security of the nation in 1934. The UMWA thinks the better conclusion is that drawn by the commentors in "The Bankruptcy Law's Effect on Collective Bargaining Agreements," 81 Colum. L.Rev. 391, 396 (1981):

> Congress had evidently never considered this situation; it had overlooked the problem of business in reorganization when it passed the NLRA, and collective bargaining agreements were in their infancy when Congress had last overhauled the bankruptcy laws. 81 Colum. L. Rev. 396 (Footnote omitted) See also n. 57 at 397.

In short, collective bargaining agreements are neither ordinary contracts nor mere executory contracts. A collective bargaining agreement, in many of its particulars, sets forth unilateral obligations and does not contemplate mutuality of performance.

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[4] In this regard see the analysis on this point put forth in Petitioner Local Union No. 408, IBT's Brief for Certiorari at 17-18, which the UMWA hereby adopts.

II. EVEN ASSUMING A COLLECTIVE BARGAINING AGREEMENT IS AN EXECUTORY CONTRACT SUBJECT TO TERMINATION BY A BANKRUPTCY COURT, SUCH A CONTRACT, FREELY ENTERED INTO BY AN EMPLOYER AND A UNION SHOULD NOT BE PERMITTED TO BE REJECTED UNTIL THE DEBTOR-IN-POSSESSION HAS MET AND BARGAINED WITH THE UNION AND FACES A CESSATION OF OPERATIONS WITHOUT TERMINATION.

A. A Debtor-In-Possession Employer Should Be Considered The Same Entity As A Pre-Bankruptcy Employer As To Its Respective Obligations Under the Collective Bargaining Agreement And Negotiating The Termination Of Such Agreements Under The Labor Laws.

Under the Third Circuit reasoning, an employer in a reorganization bankruptcy becomes a new entity and is no longer a party to its collective bargaining agreement even though ownership, management and day-to-day operations in many instances continue as before. The Third Circuit result is that on the day an employer files a reorganization bankruptcy proceeding, none of the employees are covered by existing collective bargaining agreements and the employer is free to make unilateral changes in terms and conditions of employment without regard to the NLRA and without interference by the National Labor Relations Board. The employees become, in effect, employees at will with no remedies for unfair practices. The employer is provided the opportunity to perform economic capital punishment on its employees and to discharge them without liability.

Such a result makes a mockery of the protections guaranteed to employees under the NLRA[5] and increases

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[5] Section 8(d) of the NLRA establishes that an existing collective bargaining agreement may not be modified or terminated during its

the potential for industrial strife, as employees realize that overnight they have lost contractual and statutory protections. If the *Bildisco* analysis is given effect, employees of an employer in a Chapter XI proceeding may have few alternatives to withholding their labor until a new collective bargaining agreement is reached because they will have no job security, no assurances of wage rates, seniority, pension and health benefit coverage, or any other term or condition of employment.

The Third Circuit effectively eliminates the NLRA remedy provided by Congress. The UMWA urges this Court to give effect to the NLRA in situations where a Chapter XI employer continues in operation. Where an employer receives the benefits he bargained for earlier, he should be held to his bargain. If he desires to make changes, he should be required to bargain anew.

B. In Order To Safeguard Employees' Rights And Safeguard Against Unwarranted Rejections Of A Labor Contract, A Labor Contract Should Not Be Terminated By A Bankruptcy Court Unless A Debtor-In-Possession Can Demonstrate That Otherwise Its Operations Would Cease.

Under the *Bildisco* test and facts, there are virtually no situations which would not justify the rejection of a collective bargaining agreement by an employer. Presumably, any employer could show, as the employer in *Bildisco* claimed, that money could be saved by rejection of a collective bargaining agreement. This is especially true in times of high unemployment.

The UMWA submits that, before employees should be forced to give up benefits which are an integral part of

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term without resort to the section's specific requirements for notice and bargaining.

their survival, the employer should be forced to justify that he is unable to survive without the employees giving up such benefits. Otherwise, the UMWA fears that the employer's labor contract will be the prime contract selected from among its many contracts for termination whenever the employer experiences economic troubles or decides he wants to be rid of any labor organization.

In addition, the Union fears that the bankruptcy court judge will be able to continue to reject labor contracts based in many instances on hastily drawn conclusory assertions. These fears are amply demonstrated by the facts of the instant case, where the employer candidly told the bankruptcy judge that he made an inquiry into the labor market in this area and determined that there were "non-union employees available" to replace his higher-paid union employees. (Jt. App. 59) The judge, in permitting the labor contract's rejection, determined that he need look no further. "I would assume," the Judge stated, "a good reason for . . . the court approving rejection is the fact that *the debtor apparently feels he can do without the union contract* and save . . . approximately $100,000 a year. Now if that isn't a good reason for the debtor coming in and saying I want to reject the contract, I don't know what would be a good reason." (Jt. App. 74)

It does not appear from the record that it occurred to the judge that the employer should have to consider other alternatives to the rejection of the labor contract. And without the adoption of a strict standard for rejection of such contracts, the employer will never have to consider such alternatives.

CONCLUSION

An employer in a reorganization bankruptcy proceeding is bound to the terms of its collective bargaining agreement unless and until it has complied with Section 8(d) of the NLRA and unless and until authority to reject the agreement has been granted by the bankruptcy court on a showing that the employer would, of necessity, cease operations without rejection.

Respectfully submitted,

MICHAEL H. HOLLAND, General Counsel
MARILYN TOWNSEND
United Mine Workers of America
900 15th Street, NW
Washington, DC 20005

JAMES C. KUHN, III, *Counsel of Record*
JOHN M. TISHOK
Kuhn, Engle & Stein
1512 Frick Building
Pittsburgh, PA 15219

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Curiae Brief was served by first-class mail, postage prepaid, this 6th day of May, 1983, on the following persons:

REX E. LEE, Solicitor General
CAROLYN F. CORWIN, Assistant to
the Solicitor General
Department of Justice
Washington, DC 20530

WILLIAM A. LUBBERS, General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, NW
Washington, DC 20570

JACK M. ZACKIN, ESQ.
Ravin, Katchen & Greenberg
101 Eisenhower Parkway
Roseland, NJ 07068

JAMES R. ZAZZALI, ESQ.
Zazzali, Zazzali & Kroll
Gateway I
Newark, NJ 07102

MICHAEL H. HOLLAND

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